Australian Government
Australian Public Service Commission

Raphael
By email: foi+request-8696-92ec8ac9@righttoknow.org.au

Our reference: SHC22-27698

Dear Raphael,

Freedom of Information request

1. I am writing about your 8 May 2022 internal review request made under the *Freedom of Information Act 1982* (FOI Act), of a decision issued by the Australian Public Service Commission (Commission).

2. The FOI Act and all other Commonwealth legislation referred to in this letter are publicly available from www.legislation.gov.au

Background

3. On 4 April 2022 you requested access to the following documents under the FOI Act:

   "…

   Under section 53 of the PID Act, to the extent that an investigation under the PID Act relates to an alleged breach of the Code of Conduct (within the meaning of the Public Service Act 1999), the principal officer or their delegate must comply with the procedures established under subsection 15(3) of the Public Service Act.

   According to an article published in the Australian on 8 February 2022 (Untried lawyers score key positions) "[i]n late December 2020, Ms McMullan wrote to Ms Lagos to inform her she had found the recruitment process that led to the court promoting [a female to the position of registrar] had breached the Public Service Act …"

   Presumably, this contravention of the Public Service Act was a contravention of the Code of Conduct because paragraph 13(11)(a) of the Public Service Act requires all APS employees to, at all times, behave in a manner that upholds the APS Employment Principles (among other things).

   Part A

Under the APSC's procedures established under s 15(3) of the Public Service Act:

If a determination is made in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the Commission, a written record must be made of:

a. the suspected breach; and

b. the determination; and

c. any sanctions imposed as a result of a determination that the employee has breached the Code; and

d. if a statement of reasons was given to the person regarding the determination in relation to suspected breach of the Code, or, in the case of an employee, regarding the sanction decision, that statement of reasons or those statements of reasons.

Under the FOI Act, I request a copy of the statement of reasons prepared by Ms McMullan in relation to the contravention of the Public Service Act. The document may be provided to me by return email.

Part B

Under the APSC's procedures established under s 15(3) of the Public Service Act:

A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to

a. inform the person of:

i. the details of the suspected breach of the Code, including any subsequent variation of those details; and

ii. where the person is an APS employee, the sanctions that may be imposed on them under subsection 15(1) of the Act; and

b. give the person a reasonable opportunity to make a statement in relation to the suspected breach.

It is public knowledge that Ms McMullan found that the female registrar was selected over a field of candidates who had been admitted as legal practitioners, admission being an essential qualification for the registrar position (see article published in the Australian on 8 February 2022 referred to above).

Under the FOI Act, I request copies of any documents provided to the person or persons who was or were suspected of breaching the Public Service Act (i.e. probably s 13(11)(a) of the Act), those persons presumably being responsible for selecting the female registrar above other qualified and meritorious candidates, by Ms McMullan.

The documents may be provided by email."

4. On 2 May 2022, the Commission sent to you an email containing a decision notice dated 2 May 2022 from Giorgina Strangio, Assistant Commissioner, Integrity, Performance & Employment Policy Group responding to your request.

5. Ms Strangio advised you in her decision letter that the Commission had taken reasonable steps to find documents relevant to your request and no documents had been found. As a result Ms Strangio refused your request for access under section 24A of the FOI Act.

Decision on your request for internal review

6. I am authorised under subsection 23(1) of the FOI Act to make FOI internal review decisions.

7. My role is to make a new decision on your request for internal review independently and impartially from the original decision maker. I was not involved or consulted in the making of Ms Strangio's decision. Internal review is a merit review process and I may exercise all the powers available to the original decision maker.

8. After considering your request, I am affirming Ms Strangio's initial decision.

9. I am satisfied that all reasonable steps have been taken to find any documents within the scope of your request and no documents fall within the scope of your request.

10. Part A of your request states *"…this contravention of the Public Service Act was a contravention of the Code of Conduct"*, therefore, I have interpreted your request as seeking a copy of any statement of reasons prepared by Ms McMullan relating to a suspected breach of the Code of Conduct. No documents exist for Part A of your request.

11. Part B of your request states "…*A determination may not be made in relation to a suspected breach of the Code by a person…"*, therefore I have interpreted your request as seeking a copy of documents sent by Ms McMullan to any person suspected of breaching the Code of Conduct. No documents exist for Part B because your request assumes incorrect facts about a public interest disclosure investigation.

Contacts

12. If you require clarification on matters in this letter please contact the Commission's FOI Officer by telephone on (02) 6202 3500 or by email at foi@apsc.gov.au

Review rights

13. You are entitled to seek review of this decision. Your review rights are set out at **Attachment A**.

Yours sincerely

Marco Spaccavento

Authorised FOI decision maker

9 May 2022

Rights of Review

Asking for a full explanation of a Freedom of Information decision

If you are dissatisfied with this decision, you may seek review. Before you seek review of a Freedom of Information (FOI) decision, you may contact us to discuss your request and we will explain the decision to you.

Applying for external review by the Australian Information Commissioner

If you do not agree with the original FOI decision or the internal review decision, you can ask the Australian Information Commissioner to review the decision. You have 60 days to apply in writing for a review by the Office of the Australian Information Commissioner (the OAIC) from the date you received this letter or any subsequent internal review decision.

You can **lodge your application**:

Online:	**www.oaic.gov.au**
Post:	Australian Information Commissioner
	GPO Box 5218
	SYDNEY NSW 2001
Email:	enquiries@oaic.gov.au

The OAIC encourage applicants to apply online. Where possible, to assist the OAIC you should include your contact information, a copy of the related FOI decision and provide details of your reasons for objecting to the decision.

Complaints to the Information Commissioner and Commonwealth Ombudsman

Information Commissioner

You may complain to the Information Commissioner concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Information Commissioner must be made in writing. The Information Commissioner's contact details are:

Telephone:	1300 363 992
Website:	www.oaic.gov.au

Commonwealth Ombudsman

You may complain to the Ombudsman concerning action taken by an agency in the exercise of powers or the performance of functions under the FOI Act. There is no fee for making a complaint. A complaint to the Ombudsman may be made in person, by telephone or in writing. The Ombudsman's contact details are:

Phone:	1300 362 072
Website:	www.ombudsman.gov.au